ly. I accept that at once as a correct proposition of the law. But it is apparent from the terms of the written lease itself that although dated the 4th February, 1949, it simply seeks to confirm and record in writing the terms of an oral agreement previously made between the parties in September, 1946, whereby the landlords agreed to execute a lease of the premises according to the terms thereinafter mentioned. One of those terms was covenant against assigning or subletting the premises or any part thereof without the consent in writing of the lessors. It is clear, therefore, that that was the agreement between the parties in 1946, and that the sub-lease to the present respondent was a breach of that agreement.

For these reasons this appeal must be allowed, the judgment of the learned President set aside, and the objection of the respondent to the execution proceedings dismissed. The respondent must pay the costs of these proceedings, both here and in the Court below.

Appeal allowed.

Solicitors: *Hogan, Adams & Allan; H. H. Abdoolcader.*

CHONG FONG KWEE v. KONG GIM HAM
KONG GIM HAM v. CHONG FONG KWEE

[A.C.J. (Rigby J.) October 23, 1958]

[Penang — Civil Appeals Nos. 16 and 17 of 1958]

Landlord and Tenant — Arrears of rent — Decree of possession — Rent "lawfully due" — Meaning of — Difference between Control of Rent Ordinance and English Rent Restriction Acts — Conditional order for recovery of possession — Form of — Appeal and cross-appeal.

Rent shall not be deemed to be in arrears if the tenant proves that it was tendered before due date. To avail the tenant any protection the rent must be tendered before the expiration of the 14 "days of grace" and if it is not so tendered then the landlord is entitled to ask for an order for possession.

The distinction between the local Ordinance and the English Acts is that by virtue of section 12(4) of our Ordinance (section 13(3) of the repealed ordinance) the tenancy must be determined by a notice to quit as condition precedent to an action for recovery of possession on the ground of non-payment of rent, whereas under the English legislation no such notice would appear to be necessary.

When judgment for the recovery of possession is given and the date of recovery of possession is postponed for three months the correct order to make in such a case is a conditional order for possession, but suspended so long as the monthly or weekly rent and the rent in arrears is paid.

Cases referred to:—

(1) *Bird v. Hildage* (1948) 1 K.B. 91.
(2) *Woon Onn v. Tan Yee Gek* (1950) M.L.J. 231.
(3) *Annamalai Chettiar v. Yeoh Kee Tin* (1957) M.L.J. 9.
(4) *Payne v. Cooper* (1957) 3 W.L.R. 741.
(5) *Bayman v. Rowlands* (1957) 1 All E.R. 321 p. 323.
(6) *Dellenty v. Pellow* (1951) 2 All E.R. 716.
(7) *Sherrin v. Brand* (1956) 2 W.L.R. 131.

CIVIL APPEALS, appeals from the Sessions Court.

Lim Cheng Ean for the appellant.

M. Abraham for the respondent.

Cur. Adv. Vult.

Rigby J.: This is an appeal from the judgment of Mr. B. J. Jennings, the then President of the Sessions Court, Penang, granting the respondent, as chief tenant of the premises at No. 521, Penang Road, an Order for possession of that part of the premises sub-let to the appellant, as sub-tenant, on the ground that the appellant was more than 14 days in arrears with his rent. The learned President, however, in the exercise of his discretion under section 12(2) of the Control of Rent Ordinance, 1956, postponed the date of possession for 3 months from the 26th March, 1958, the date of his decision, provided the tenant paid the arrears of rent and the current rent. It is to be observed that that is a postponement of the date of possession for 3 months, subject to the fulfilment of certain conditions and not a suspension of the Order itself for as long as the current monthly rent and the rent in arrears is paid.

There is a separate appeal — which, for the purpose of convenience, I propose to refer to as a cross-appeal — by the respondent against that part of the Order on the ground that the learned President wrongly exercised his discretion in favour of the appellant by postponing the date of possession for 3 months. Since the period of 3 months' postponement had already expired before the cross-appeal was lodged, it is a little difficult to appreciate the object of the cross-appeal.

The appellant's main ground of appeal — and the point was not taken at all before the learned President — is based on the contention that the Court below had no jurisdiction to make

the Order for possession asked for by the respondent as the appellant was not in arrears with his rent at the date of the action or at any time thereafter and the action was, in fact, not an action to recover arrears of rent at all. This argument is based upon a consideration of section 12(1)(a) of the Ordinance and a comparison of that section with its counterpart, section 13(1)(a) in the repealed Control of Rent Ordinance, 1948. Section 13(1)(a) of the 1948 Ordinance enacted:—

"13. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

(a) where, at the date of the service of the notice determining the tenancy given by the landlord, rent lawfully due was in arrears for fourteen days or upwards;

Provided that rent shall not be deemed to be in arrear if the tenant proves that it was tendered before such date;"

Section 12(1) of the present Ordinance is identical with the repealed section 13(1), but paragraph (a) differs in the following respect:—

"(a) where rent lawfully due has been in arrear for fourteen days or upwards:

Provided that rent shall not be deemed to be in arrear if the tenant proves that it was tendered before such date;"

The proviso to paragraph (a) is identically the same as the proviso to paragraph (a) of the repealed Ordinance.

It is apparent, therefore, that under the repealed Ordinance the relevant date for determining whether the rent was 14 days or upwards in arrear was the date of service of the notice to quit. In the absence of those words in the present Ordinance what is the relevant date under the present Ordinance? Mr. Lim Cheng Ean, for the appellant, submitted that the crucial date for considering whether or not the tenant was in arrears with his rent for 14 days or upwards was the date of the institution of the proceedings. He further submitted that this was in accordance with English law which provides that a Court shall have power to make or give an Order or judgment for the recovery of possession of any dwelling house to which the Rent Restriction Acts apply "if any rent lawfully due from the tenant has not been paid." (See *R. E. Megarry's* The Rent Acts, 8th edition, page 570). In support of his argument Mr. Lim Cheng Ean referred to the case of *Bird v. Hildage.* [1] That case is undoubtedly clear authority for the proposition that under the relevant English legislation the landlord must prove that at the date when he commences proceedings for possession not only is rent "lawfully due" but also that it "has not been paid." Further, that no Order for possession can be made if at that date, namely, the date of the institution of proceedings the rent has been tendered, even though it was overdue, for although not paid punctually it "has been paid."

On the facts of the present case the appellant was in arrears with his rent for a period of 4 months — from May to August, 1957, inclusive. On the 4th September, the respondent, through her Solicitors, gave notice to quit and on the following day the appellant, through his Solicitors, tendered payment of the 4 months' arrears of rent. That payment, in accordance with the accepted practice amongst Solicitors, was accepted by the respondent's Solicitors without prejudice to the existing Notice to Quit terminating the tenancy. Subsequent monthly payments of rent was accepted without prejudice on the same basis. On the 13th November, the respondent instituted proceedings for recovery of possession on the ground that prior to the service of the Notice to Quit the respondent was 4 months in arrears with his rent. If Mr. Lim Cheng Ean's contention is correct that the relevant date for the purpose of considering whether the respondent was in arrears with his rent is the date of the institution of proceedings and that the principle enunciated in *Bird v. Hildage* should be applied, then this appeal must be allowed. But to my mind the vital distinction between the English Act and the 1956 Ordinance lies in the omission from the latter of the words "and has not been paid." The importance to be attached to those words following upon the words "lawfully due from the tenant" is apparent from the penultimate paragraph in the judgment of Cohen, L.J., delivering the judgment of the Court, in the case of *Bird v. Hildage.* He said:—

"We add that, in our judgment, if the words 'lawfully due' must be taken to mean that the obligation to pay rent has arisen and not been discharged in fact, and if the offer made by the tenant in the present case is to be taken not to have discharged the debt, the words 'it has not been paid' would in the circumstances of this case be fatal to the landlord. As a matter of English the words 'pay' and 'paid' do not necessarily import both the act of offering the money and the act of its acceptance. If rent is taken to be lawfully due so long as the debt is undischarged, it would have been sufficient for the paragraph to have said 'if any rent is lawfully due'; and a landlord could always invoke the jurisdiction of the court by declining to accept rent a day after the due date for its payment."

Rent is "lawfully due" as soon as the proper date for payment has arrived. If rent "lawfully

due" is in arrears for 14 days or upwards, then it seems to me that the landlord has a right of action — I hesitate to call it a vested interest — to institute proceedings for recovery of possession, and I do not think that right of action can be stultified or negatived by the subsequent tender to him of the arrears due unless, of course, he chooses to waive the breach by an unconditional acceptance of such tender. To my mind the proviso to the paragraph strengthens that view. Rent shall not be deemed to be in arrears if the tenant proves that it was tendered before such date. To avail the tenant any protection the rent must be tendered before the expiration of the 14 "days of grace" and if it is not so tendered then the landlord is entitled to ask for an Order for possession.

A further distinction between the 1956 Ordinance — and, indeed, the repealed 1948 Ordinance — and the English Rent Restriction Acts is that by virtue of section 12(4) of our Ordinance (section 13(3) of the repealed Ordinance) the tenancy must be determined by a notice to quit as a condition precedent to an action for recovery of possession on the ground of non-payment of rent, whereas under the English legislation no such notice would appear to be necessary.

I am, therefore, of the opinion that the learned President had jurisdiction to make the Order for possession since the appellant was, in fact, in arrears with his rent at the date of the hearing of the action.

Mr. Lim Cheng Ean's next ground of appeal was that the rent claimed under the Notice to Quit was irrecoverable and illegal. That submission is based upon the fact that by his defence and counterclaim the appellant averred that the amount of rent he had, in fact, paid as a sub-tenant was in excess of the maximum amount legally recoverable from him as a sub-tenant under section 15(b) of the Ordinance. At the conclusion of the evidence before him the learned President, as he was entitled to do under section 17 of the Ordinance, referred the matter to the Rent Assessment Board for an apportionment of the share of the rental which the appellant ought to pay. The Assessment Board apportioned the appellant's share of the rent as $53.80 per month, which was $6.20 per month less than the rent he had, in fact, been paying. Conversely, the learned President found that the rent charged was $6.20 per month more than the maximum recoverable rent. But even assuming the standard rent was $53.80 per month and not $60 as charged, it was manifest that the rent paid by the appellant was not sufficient to cover the amount of arrears of rent lawfully due and the appellant was, in fact, in arrears for 14 days or upwards with the rent lawfully due from him. The learned President following the cases of *Woon Onn v. Tan Yee Gek*, [2] and *Annamalai Chettiar v. Yeoh Kee Tin* [3] accordingly held that the arrears of rent even if they were claimed as a rent which was excessive, could form the basis of a good action for ejectment for non-payment of the rent lawfully due. Those two cases were decided under the repealed 1948 Ordinance, but I can see no possible reason why the principle enunciated should not equally apply to the present Ordinance and provided the amount of rent lawfully claimed proves that the tenant is, in fact, in arrears of rent for 14 days or upwards a valid claim is established. This ground must accordingly be dismissed.

Lastly it was argued that since the evidence established that the appellant had been charged a rental in excess of the maximum amount recoverable from him he was entitled to succeed on his counterclaim. The excess amount recoverable amounted to $63.80 and Mr. Abraham, for the respondent, conceded that the appellant was entitled to his costs on that issue. I observe, however, that the learned President specifically made no order as to costs in the action as a whole.

Turning now to the cross-appeal. Since commencing this judgment I have noticed that there is a distinction between the Order made by the learned President at the time of giving his oral judgment on the 26th March, 1958, and the grounds of judgment signed by him on the 16th April, 1958. His record at the time he gave judgment granting a decree for possession reads as follows:—

> "Decree for possession for non-payment of rent stay 3 months with effect from 26th March, 1958. If sub-tenant pays arrears and current rent at $63.80 less excess payments at $6.20 with effect from 1st July, 1956 he can apply for discharge under section 12(2)."

That Order appears to be a qualified version of the Order given by the trial Court in *Payne v. Cooper*. [4] In his grounds of judgment, however, the Order given by him is judgment for the recovery of possession but a postponement of the date of possession for three months from the 26th March, 1958, providing the tenant pays the arrears of rent now settled and the current rent after setting off against those arrears the excess of rent already received. There is clearly a distinction between the two Orders. The former given by him at the trial amounts to an

Order for possession which can be discharged at the end of three months provided the appellant by that time has paid off the arrears and the current rent. The Order given in the grounds of judgment, on the other hand, amounts to no more than an Order postponing possession for a period of three months as from the date of the giving of the Order. The Order given at the trial enabling the appellant to apply for discharge at the end of three months complies with the provisions of the English Act (The Rent and Mortgage Interest Restriction Act, 1923, section 4(2)), but I have some doubt as to whether such an Order enabling an application for discharge to be made at a future period can be granted under the wording of section 12(2) of our Ordinance. I think the correct Order to make in such a case is a conditional Order for possession, but suspended so long as the monthly or weekly rent and the rent in arrears is paid. I think this is the Order which the learned President intended to make and I think it is the Order which he was entitled to make, and ought to have made, on the facts of the case. I think, moreover, that that must be the Order which learned Counsel for the appellant contemplates to have been made; otherwise clearly there would have been no point in him appealing against the Order as it stands in the grounds of judgment of a postponement of possession for three months as from the 26th March, 1958, since such period of postponement had already elapsed before he lodged his appeal, and he was entitled to possession forthwith. I think, therefore, I must take the view that the Order which the learned President intended to make and which he must be deemed to have made was a conditional Order for the recovery of possession of the premises in question suspended for so long as the lawfully recoverable rent in arrear was paid and the monthly current rent continued to be paid as and when lawfully due. On the facts of the case I am of the opinion that that was an Order which he was perfectly entitled to make and, indeed, the Order which he ought to have made on the facts of the case. The words of Denning, L.J. in the case of *Bayman v. Rowlands* [5] (at p. 323) are relevant for consideration in this respect. He said:—

"If the tenant is in arrear, in these cases under the Rent Restrictions Acts the every day practice is to make an Order for possession, but to suspend it so long as the current weekly rent and a payment on account of the rent in arrear are paid in."

That is a practice which follows the principle laid down in the earlier English cases of *Dellenty v. Pellow*, [6] and *Sherrin v. Brand* [7] that where arrears are paid into Court or tendered before judgment, *prima facie* it is unreasonable to make an Order for possession. Each case, of course, must depend upon its own facts and there may well be cases — as, for example, where the tenant is repeatedly in arrears with his rent — where it is reasonable for the Court to make an unconditional Order for possession. The cross-appeal is accordingly dismissed.

In the result this appeal must accordingly be dismissed with costs, and the cross-appeal must also be dismissed with costs.

Appeal dismissed.

Solicitors: *Lim Cheng Ean; M. Abraham.*

TAY YEW HENG v. LEE THEAN LAI

[A.C.J. (Syed Sheh Barakbah J.) November 1, 1958]

[Ipoh — Civil Appeal No. 7 of 1958]

Landlord and Tenant — Ejectment — Control of Rent Ordinance, 1956, s.12(1)(m) — Appeal on point of law — Whether High Court can interfere with the Certificate of the Rent Assessment Board.

This was an appeal by the tenant against the decision of the Rent Assessment Board, Taiping, granting permission to the owner to apply to the Court for an order to eject him from premises No. 228, Kota Road, Taiping, subject to the conditions laid down in the Certificate issued under section 12(1)(m) of the Control of Rent Ordinance, 1956.

On September 20, 1955, Notice requiring abatement of nuisance was served by the Town Council on the owner requiring him to execute certain works to the premises as specified in the Notice. The owner thereupon wrote to the Town Council applying for permission to demolish the house for the purpose of rebuilding and submitted a plan, which was approved by the Town Council. On January 10, 1957, the owner received a letter from the Town Council enquiring when the house would be demolished and he replied that notice had been issued to the tenant to vacate the premises and that he would proceed to build as soon as the tenant vacated the house. The tenant failed to vacate and the application to the Rent Assessment Board was accordingly made.

Two questions arose in the appeal: (i) was there an appeal from the decision of the Board in this case; and (ii), if there was, could the Court interfere with the Certificate of the Board stating that the Board was satisfied that the owner intended to demolish the premises for the purpose of rebuilding, and that in the opinion of the Board it was in the public interest that the owner be permitted to do so.

Section 11(1) of the Control of Rent Ordinance enacts; "An appeal shall lie on a point of law from any decision of the Board."

Counsel for the tenant submitted that when there was a wrong finding of fact it then became a question